

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

September 11, 2017

### VIA FOIA ONLINE

Environmental Protection Agency  
National Freedom of Information Office  
ATTN: Ms. Ann Dunkin, Chief Information Officer  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, D.C. 20460

### **Re: Freedom of Information Act Request**

Dear Ms. Dunkin:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability.

Earlier this year, the press reported that a “small group of career [Environmental Protection Agency (“EPA”)] employees—numbering less [*sic*] than a dozen so far—[were] using an encrypted messaging app” called “Signal.”<sup>2</sup> Concerned that these officials might have used Signal to avoid transparency laws, CoA Institute filed a Freedom of Information Act (“FOIA”) request and a notice under the Federal Records Act, alerting the EPA of its legal obligation to preserve records that evidence employees working on official government business, no matter the medium of their communication.<sup>3</sup> That request was the subject of a recent lawsuit,<sup>4</sup> as was a similar request submitted by Judicial Watch.<sup>5</sup> CoA Institute later filed a second FOIA request seeking access to a contractor-generated agency report that identified the EPA-furnished mobile devices running the Signal “app.”<sup>6</sup>

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about) (last accessed Aug. 30, 2017).

<sup>2</sup> Andrew Restuccia, Marianne Levine, & Nahal Toosi, *Federal workers turn to encryption to thwart Trump*, POLITICO (Feb. 2, 2017), <http://politi.co/2km4Qrb>; *EPA Employees Are Using Encryption Technology To Hide Resistance To Trump—But Is It Legal?*, DAILY CALLER (Feb. 2, 2017), <http://bit.ly/2wJfqkI>.

<sup>3</sup> Letter from CoA Inst. to Catherine McCabe, Acting Adm’r, & Ann Dunkin, Chief Info. Officer, Env’tl. Prot. Agency (Feb. 2, 2017) (on file with CoA Inst.); see also CoA Inst., Press Release: CoA Institute Investigates EPA Employees Using Electronic Messaging Apps to Thwart Transparency (Feb. 3, 2017), *available at* <http://coainst.org/2x4EUc7>; Alex Swoyer, *Lawsuit demands EPA say if employees using encrypted messages to evade open-records laws*, WASH. TIMES (Feb. 2, 2017), <http://bit.ly/2kWNMdn>.

<sup>4</sup> *Cause of Action Inst. v. Env’tl. Prot. Agency*, No. 17-0509 (D.D.C. filed Mar. 21, 2017); see also CoA Inst., Press Release: Lawsuit Demands Records on EPA Employees’ Use of Encrypted Messaging App (Mar. 22, 2017), *available at* <http://coainst.org/2ocoSJR>; Steven Trader, *EPA Sued Over Employees’ Use of Encrypted Messaging App*, LAW360 (Mar. 23, 2017), <http://bit.ly/2wSpKai>.

<sup>5</sup> *Judicial Watch, Inc. v. Env’tl. Prot. Agency*, No. 17-0533 (D.D.C. filed Mar. 23, 2017).

<sup>6</sup> Letter from CoA Inst. to Ann Dunkin, Chief Info. Officer, Env’tl. Prot. Agency (Aug. 30, 2017) (on file with CoA Inst.). On February 3, 2017, the EPA “received a request from the Office of Inspector General [“OIG”] asking for assistance in identifying whether certain mobile apps, including Signal, had been downloaded” to EPA devices. Def.’s

With the foregoing as background, and pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following:

All records concerning efforts (1) to retrieve, recover, or retain records created or received by EPA employees on Signal, and (2) to investigate agency employees’ unauthorized use of encrypted-messaging applications. Responsive records would include, but are not limited to, e-mail correspondence between the Office of Environmental Information and the Office of Inspector General. Responsive records also would include any final complaints, reports, or memoranda saved to the Inspector General Enterprise Management System (“IGEMS”), such as the EPA’s “complaint initiation document.”<sup>7</sup>

The time period for this request is February 4, 2017 to the present.<sup>8</sup>

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of all applicable fees. The FOIA and applicable regulations provide that the EPA shall furnish the requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>9</sup>

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the extent to which EPA employees used an instant messaging application, Signal, and efforts by the agency to investigate its unauthorized use. Disclosure will “contribute significantly” to public understanding because, to date, the public has not known all relevant details of how the EPA attempted to retrieve these records. Public interest is particularly acute in light of press attention to the Signal matter;<sup>10</sup> other scandals surrounding record

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Statement of Undisputed Material Facts at ¶ 13, *Judicial Watch, Inc. v. Env’tl. Prot. Agency*, No. 17-0533 (D.D.C. motion filed Aug. 15, 2017). On February 7, 2017, “an EPA contractor generated a report of the information contained in the MDM database from all Agency devices enrolled in the MDM software.” *Id.* ¶ 15. This report would have identified any devices that were then running Signal.

<sup>7</sup> See E-mail from [REDACTED], Env’tl. Prot. Agency, to [REDACTED], Env’tl. Prot. Agency (Feb. 3, 2017, 4:50 PM) (“[P]lease spin up a complaint initiation document for the below allegation. Per [REDACTED] send it to me and we will get it up the chain for Pat’s review prior to opening the complaint in IGEMS.”) (attached as Exhibit 1).

<sup>8</sup> For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

<sup>9</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1); see *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>10</sup> See, e.g., CoA Inst., Press Release: CoA Institute Uncovers EPA Investigation into Employees’ Use of Encrypted Messaging App (Mar. 23, 2017), available at <http://coainst.org/2vJa7Nr>; see also Michael Bastasch, *EPA Is Investigating Employees Who Send Encrypted Text Messages*, DAILY CALLER (Mar. 23, 2017), <http://bit.ly/2xxt87Q>; Ralph R. Smith, *EPA Investigating Employee Covert Activity*, FEDSMITH (Mar. 24, 2017), <http://bit.ly/2xxsasa>.

preservation and former Secretaries of State Colin Powell and Hillary Clinton, the heads of the Departments of Defense and Homeland Security; and broader congressional efforts.<sup>11</sup>

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public through CoA Institute's regularly published online newsletter, memoranda, reports, or press releases.<sup>12</sup> In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request to Be Classified as a Representative of the News Media**

For fee purposes, CoA Institute also qualifies as a "representative of the news media."<sup>13</sup> As the D.C. Circuit held, the "representative of the news media" test is properly focused on the requestor, not the specific request at issue.<sup>14</sup> CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work product, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>15</sup> These distinct works are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>16</sup> In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.<sup>17</sup>

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<sup>11</sup> See, e.g., Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://goo.gl/IGEY6l>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://goo.gl/pnWJvM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton's Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://goo.gl/A6WoLB>; Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials' Private Email Docs*, DAILY CALLER (Nov. 18, 2015), <http://goo.gl/b3xlaZ>; Rachel Witkin, *Sec. Jeb Johnson: 'Whoops' on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), <http://goo.gl/KH3SA7>.

<sup>12</sup> See also *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>13</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(b)(6).

<sup>14</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>15</sup> See generally CAUSE OF ACTION INST., *Media*, [www.causeofaction.org/media](http://www.causeofaction.org/media) (last visited Sept. 11, 2017).

<sup>16</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>17</sup> See, e.g., FOIA Request 2016-11-008, Dep't of the Treasury (Nov. 7, 2016); FOIA Requests OS-2017-00057 & OS-2017-00060, Dep't of Interior (Oct. 31, 2016); FOIA Request 2017-00497, Office of Personnel Mgmt. (Oct. 21, 2016);

### **Record Preservation Requirement**


CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>18</sup>

### **Record Production and Contact Information**

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or by e-mail at [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org). Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY  
COUNSEL

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FOIA Request 092320167031, Ctrs. for Medicare & Medicaid Servs. (Oct. 17, 2016); FOIA Request 17-00054-F, Dep't of Educ. (Oct. 6, 2016); FOIA Request DOC-OS-2016-001753, Dept. of Commerce (Sept. 27, 2016); FOIA Request 2016-09-101, Dep't of the Treasury (Sept. 21, 2016); FOIA Request DOC-OIG-2016-001732, Office of Inspector Gen., Dep't of Commerce (Sept. 15, 2016); FOIA Request OS-2016-00435, Dep't of the Interior (Aug. 31, 2016); FOIA Request 2016-366-F, Consumer Fin. Prot. Bureau (Aug. 11, 2016); FOIA Request F-2016-09406, Dep't of State (Aug. 11, 2016); FOIA Request 2016-08-070, Dep't of the Treasury (Aug. 10, 2016); FOIA Request 2016-00896, Bureau of Land Mgmt., Dep't of the Interior (Aug. 10, 2016); FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep't of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 2015).

<sup>18</sup> See 40 C.F.R. § 2.106; see also 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records."); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act."); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

# EXHIBIT

## 1

**To:** (b) (6), (b) (7)(C)  
**From:** (b) (6), (b) (7)(C)  
**Sent:** Fri 2/3/2017 9:52:49 PM  
**Subject:** Re: Lawsuit demands EPA say if employees using encrypted messages to evade open-records laws

10-4

(b) (6), (b) (7)(C)  
Special Agent  
EPA - Office of Inspector General  
Washington, DC  
Cell: (b) (6), (b) (7)(C)  
Office (b) (6), (b) (7)(C)

On Feb 3, 2017, at 4:50 PM, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) wrote:

(b) (6), (b) (7)(C) as we discussed, please spin up a complaint initiation document for the below allegation. Per (b) (6), (b) (7)(C) send it to me and we will get it up the chain for Pat's review prior to opening the complaint in IGEMS.

\*\*\*BREAK\*\*\*

(b) (6), (b) (7)(C) just a heads up but no action yet, we will be initiating a hotline complaint in the near future, but hold off until you hear from me please. Management wants to see what the IT folks net before we move forward with the actual hotline initiation.

Thanks guys. More to follow...

(b) (6), (b) (7)(C)

**From:** (b) (6), (b) (7)(C)  
**Sent:** Friday, February 03, 2017 2:09 PM  
**To:** (b) (6), (b) (7)(C) <(b) (6), (b) (7)(C)>; (b) (6), (b) (7)(C) <(b) (6), (b) (7)(C)>

OIG-003

**Subject:** Fwd: Lawsuit demands EPA say if employees using encrypted messages to evade open-records laws

Hi. 2:30 meeting. Please attend

Sent from my iPhone

Begin forwarded message:

**From:** "Elkins, Arthur" <Elkins.Arthur@epa.gov>

**Date:** February 3, 2017 at 1:39:49 PM EST

**To:** "Sullivan, Patrick F." <Sullivan.Patrick@epa.gov>

**Cc:** "Sheehan, Charles" <Sheehan.Charles@epa.gov>, "Larsen, Alan" <Larsen.Alan@epa.gov>, (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

**Subject:** RE: Lawsuit demands EPA say if employees using encrypted messages to evade open-records laws

Okay, thank you.

Art

**From:** Sullivan, Patrick F.

**Sent:** Friday, February 03, 2017 1:28 PM

**To:** Elkins, Arthur <Elkins.Arthur@epa.gov>

**Cc:** Sheehan, Charles <Sheehan.Charles@epa.gov>; Larsen, Alan <Larsen.Alan@epa.gov>; (b) (6), (b) (7)(C)

**Subject:** Lawsuit demands EPA say if employees using encrypted messages to evade open-records laws

Art,

OIG-004

Per our conversation, see link to this news story.

<http://www.washingtontimes.com/news/2017/feb/2/cause-action-demands-epa-say-if-employees-using-cn/>

If the allegations reported in the story are correct, it appears that some EPA employees are engaged in potential serious misconduct in two areas:

1) Using unauthorized encryption apps on their EPA devices in violation of law and EPA policy; and

2) (b)(5) - deliberative process  
[REDACTED]

[REDACTED] has informed me that Chuck will be in later this afternoon and he has scheduled a meeting at 4:30pm. I will bring with me appropriate OI personnel to discuss this issue.

Patrick F. Sullivan

Assistant Inspector General for Investigations

EPA Office of Inspector General

Desk: (202) 566-0308

Cell: (b) (6), (b) (7)(C)

FAX: (202) 566-0814

OIG-005

Email: [sullivan.patrick@epa.gov](mailto:sullivan.patrick@epa.gov)